

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TANVEER A. AND ZEB A T. KHAN	:	ORDER
		DTA NO. 819739
for Revision of a Determination or for Refund of Sales and :		
Use Taxes under Articles 28 and 29 of the Tax Law for the :		
Period June 1, 1998 through April 19, 2002.	:	

Petitioners, Tanveer A. and Zeba T. Khan, 10 Lutz Drive, Valley Stream, New York 11580-3112, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1998 through April 19, 2002.

On January 12, 2004, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On February 6, 2004, the Division of Taxation, by Mark Volk, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Petitioners did not respond to the Notice of Intent. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this Order commenced February 11, 2004. After due consideration of the documents and arguments submitted, Timothy J. Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioners, Tanveer A. and Zeba T. Khan, filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) in protest of Notice of Determination L-021306203 dated July 15, 2002.

2. Petitioners’ request for conference lists the following as their address:

Tanveer A. & Zeba T. Khan
7-Eleven Food Store 11158A
7 Eleven Inc. Mkt 2422
135 Maxess Rd
Melville, NY 11747-3801

3. Petitioners’ request also lists the name and address of their representative as follows:

Ira Friedman
Silver & Co.
155 East 55th Street Suite 300B
New York, New York 10022

4. Petitioners’ conciliation conference was scheduled for June 11, 2003. Although given due notice, petitioners failed to appear at the conference.

5. BCMS subsequently issued a Conciliation Default Order to petitioners (CMS No. 193985) dated July 11, 2003, which denied petitioners’ request and sustained Notice of Determination L-021306203.

6. On November 5, 2003, petitioners filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Default Order dated July 11, 2003.

7. On January 12, 2004, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioners. The Notice of Intent to Dismiss Petition indicates that the Conciliation Default Order in this matter was issued on July 11, 2003, but that the petition was not filed until November 5, 2003, or 117 days later.

8. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the affidavits of Bruce Peltier and Carl Decesare, both employees of the Division. The Division also submitted a copy of petitioners' Request for Conciliation Conference, a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on July 11, 2003, and a copy of the subject July 11, 2003 Conciliation Default Order.

7. The affidavit of Carl Decesare, Assistant Director of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by United States Postal Service ("USPS") certified mail and confirmation of the mailing through BCMS' receipt of a postmarked copy of the CMR.

8. The BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, to the conciliation conferee for signature, who in turn, forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

9. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produces a computer-generated CMR entitled "Assessments Receivable, Certified Record for Presort Mail." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded

by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. On the last page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "7/11/03" is written in the upper right corner of each page of the CMR.

14. The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up, in BCMS, by an employee of the Division's Mail Processing Center.

15. Mr. Decesare attested to the truth and accuracy of the copy of the six-page CMR attached to his affidavit which contains a list of the conciliation orders assertedly issued by the Division on July 11, 2003. This CMR lists 59 certified control numbers and there are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

16. Information regarding the conciliation order issued to petitioners is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0025 9978 is reference/CMS number 000193985, along with the following address:

Tanveer A. & Zeba T. Khan
7-Eleven Food Store 11158A
7-Eleven, Inc. Market 2422 - 1 Melville NY 11747-3801

17. Page one of the CMR contains information regarding a conciliation order issued to petitioner's representative. Specifically, corresponding to certified control number 7104 1002 9730 0025 9671 is reference/CMS number 000193985 along with the name and address of petitioners' representative as follows:

Ira Friedman
155 East 55th Street - Suite 3
New York, NY 10022

18. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and/or his or her initials or signature to the CMR indicating receipt by the post office.

19. In this particular instance, the postal employee affixed a postmark dated July 11, 2003 to each page of the six-page CMR. The postal employee also wrote his or her initials and the

number “59” next to the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial.

20. Mr. Peltier states that the CMR is the Division’s record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division’s Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier’s staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

21. Based upon his review of the affidavit of Carl Decesare, the exhibits attached thereto and the CMR, Mr. Peltier states that on July 11, 2003, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Tanveer A. and Zeba T. Khan, 7-Eleven Food Store 11158A, 7-Eleven, Inc., Market 2422-1, Melville, NY 11747-3801 and a piece of certified mail addressed to Ira Friedman, 155 East 55th Street, Suite 3, New York, NY 10022 to a branch of the USPS in Albany, New York in sealed envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on July 11, 2003 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the piece of certified mail to petitioners on July 11, 2003.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 1138(a)(1)(b) the conciliation order in this case and the underlying Notice of Determination would be binding upon petitioners unless they filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). Here, the Division failed to meet this burden. Specifically, pursuant to Tax Law § 1147(a)(1) BCMS was required to mail the subject Conciliation Default Order to petitioners at their last known address (*see, Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavit of Bruce Peltier, the address on the conciliation order mailed to petitioners by BCMS omitted the street address (*see, Findings of Fact "2" and "16"*). Such an omission of an essential element of an address is not harmless error (*see, Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). Because of this error, proper mailing has not been established and thus the Division does not benefit from any presumption of delivery and petitioners do not face the burden of rebutting such a presumption.

Additionally, there is no evidence in the record of actual delivery or actual receipt of the Conciliation Default Order or of petitioners' actual notice of such order (*cf.*, *Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, *lv denied* 79 NY2d 759, 584 NYS2d 447; *Matter of Karolight, Ltd.*, Tax Appeals Tribunal, July 30, 1992). Accordingly, there is insufficient evidence in the record to support a dismissal of the petition as untimely pursuant to 20 NYCRR 3000.9(a)(4).

C. In its cover letter filed with its documents in support of the Notice of Intent, the Division asserted that, the error in petitioners' address notwithstanding, the mailing of a copy of the Conciliation Default Order to petitioners' representative, Ira Friedman, was sufficient to support a dismissal of the petition. This assertion is rejected. Although a taxpayer's representative must be served with a statutory notice (*see, Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988), such service does not obviate the necessity of service upon the taxpayer. As noted previously, Tax Law § 1147(a)(1) requires that the notice be served upon the taxpayer "at the address given in the last return filed by him . . . or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable."¹

D. The Notice of Intent to Dismiss Petition dated January 12, 2004 is withdrawn.

DATED: Troy, New York
March 25, 2004

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE

¹ The copy of the conciliation order mailed to petitioners' representative was also erroneously addressed (*see*, Findings of Fact "3" and "17"). This order does not address whether this error was consequential.